

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CLIFFORD C. HURST and
JACK L. DAVIS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY and
TOWN OF EATONVILLE,

Respondents.

PCHB Nos. 81-208 & 82-13

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of the Department of Ecology's approval of a permit for the Town of Eatonville to appropriate public surface waters, came on for hearing before the Pollution Control Hearings Board, Nat W. Washington, Chairman, and Gayle Rothrock, Member, convened at Lacey, Washington on May 5, 1982. William A. Harrison, Administrative Law Judge, presided. Respondent Department of Ecology (DOE) elected a formal hearing pursuant to RCW 43.21B.230.

Appellants appeared and represented themselves. Respondent

1 Department of Ecology appeared by Richard L. Kirkby, Assistant
2 Attorney General. Respondent Town of Eatonville appeared by its
3 engineer, H. G. Harstad. The proceedings were electronically recorded.

4 Witnesses were sworn and testified. Exhibits were examined. From
5 testimony heard and exhibits examined, the Board makes these

6 FINDINGS OF FACT

7 I

8 The Town of Eatonville proposes to construct a hydro-electric
9 development on the Little Mashel River in Pierce County. The
10 development is a 1-1/2 megawatt hydro-electric generating facility
11 which would make non-consumptive use of the river's water. This would
12 be accomplished by use of a "penstock" (pipe) to divert water at the
13 top of Little Mashel Falls, and to convey it to a generating station
14 at the base of the Falls where the diverted water would re-enter the
15 river.

16 II

17 The Town made a master permit application to DOE on January 29,
18 1981, under the Environmental Coordination Procedures Act (ECPA),
19 chapter 90.62 RCW. It ultimately sought to divert 100 cubic feet per
20 second (cfs) from the Little Mashel for this hydro-electric
21 development. Following public notice, hearing and comment, the ECPA
22 master permit was issued on June 15, 1981. It included a "Preliminary
23 Permit" for surface water diversion. On December 4, 1981, DOE
24 recommended approval of a regular surface water diversion permit for
25 100 cfs, when available, for the Town's development. Water is

1 available in the amount applied for at least a portion of each year.
2 From this, appellants appeal.

3 III

4 Appellants reside near the confluence of the Little Mashel River
5 and the Mashel River. Each holds a water right for diversion of
6 .02 cfs from springs near their homes. These rights are for domestic
7 use including water for one or two head of cattle. Appellant Davis
8 also uses the spring water for raising steelhead trout in cooperation
9 with the Department of Game.

10 IV

11 Any recharge to appellants' springs from water draining downhill
12 and into the Little Mashel will probably be unaffected by the
13 construction of either the access road or other features of the
14 hydro-electric project.

15 V

16 The temporary diversion and re-entry of water through the penstock
17 will reduce flows markedly over Little Mashel Falls. But the river
18 flow both upstream and downstream of the penstock will not be
19 reduced. If water in the Little Mashel recharges appellants' springs,
20 this diversion will probably not affect such recharge due to the
21 retainage of present flows in the Little Mashel directly upstream of
22 the springs. The flow may seep through the river bed there to
23 recharge the springs. This project would not inhibit that.

24 The penstock, by contrast, would "de-water" the Little Mashel
25 Falls segment of the river which is not a likely location for seepage
26 due to its steep rock bed.

VI

Appellants have not measured the yield of the springs where they make their diversion. However, they are apprehensive that the proposed diversion will, in some degree, diminish this unmeasured spring yield.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

The four criteria governing issuance of a permit to appropriate public surface water, as here are:

- 1) that water is available for appropriation
- 2) for a beneficial use, and
- 3) the appropriation thereof as proposed in the application will not impair existing rights or
- 4) be detrimental to the public welfare.

RCW 90.03.290. We conclude on this evidence that water is available for appropriation for a beneficial use and the appropriation will not be detrimental to the public welfare.

II

Regarding the final criterion of impairment, an appellant must show, beyond speculation, that the proposed appropriation will, more likely than not, impair an existing water right. Appellants have not

1 met this burden in this appeal. The appropriation permit approval
2 must therefore be affirmed.

3 III

4 DOE has authority to regulate and control diversion of water in
5 accordance with the rights thereto. RCW 43.21.130(3). Such
6 regulation is appropriate if DOE determines that this diversion, when
7 operated, actually impairs appellants' senior water rights. Such a
8 determination, if necessary, is for the future.

9 IV

10 Any Finding of Fact which should be deemed a Conclusion of Law is
11 hereby adopted as such.

12 From these Conclusions the Board enters this
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ORDER

The surface water appropriation permit approved by the Department of Ecology is hereby affirmed.

DONE this 17th day of June, 1982.

POLLUTION CONTROL HEARINGS BOARD

Nat W. Washington
NAT W. WASHINGTON, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

William A. Harrison
WILLIAM A. HARRISON
Administrative Law Judge